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UKRAINE CRISIS: TYPES OF INTERVENTIONS, PUNISHMENT OF CRIMES AND INTERNATIONAL LAW

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Abstract: The present work tries to analyze the role of the International Court of Justice (ICJ) in the Ukrainian crisis. What kind of intervention can be done to the crime of genocide based as a precautionary appeal and with the aim of avoiding litigation? The practice already from the first months has shown that the dispute did not stop with a question to the International Court of Justice (ICJ), a body not competent to resolve the dispute. Already the speed of the ICJ shows perhaps for the first time the commitment of the international community to be close to peoples who need their help. The jurisprudential history of the ICJ will shed light on the positions held by the first steps of the ICJ in relation to the controversy.

Key words: crime of genocide, ICJ, resolution of international conflict, international law, international justice, Ukraine crisis.

Introduction

The crisis in Ukraine and the war that began has shown, yet

another time, that international law always remains “fragile” and under discussion, above all because human life continues to be always second in line and neglected in front of political, military and economic interests.

International bodies are involved, such as the ICJ which delivered its order in the dispute, Ukraine v. Russia by ordering immediately from 24 February 2022 to suspend military operations that began a few days earlier. Russia has left the Council of Europe and, as a consequence, its exit from the European Court of Human Rights as well. The International Criminal Court (ICC), through its Prosecutor, traveled to Ukraine to cooperate on ad hoc and ongoing investigations for crimes that are prohibited and punishable under the statute of the ICC. The investigations (termination of emergency) did not start now but about 7 years ago during the Russian occupation of Crimea. The purpose is the punishment of crimes provided for by art. 8 bis of the StICC and the crime of aggression according to art. 15-bis (5) of the statute despite the discussion of the jurisdiction of such investigations given that both Russia and Ukraine are not members of the ICC and a referral of the Security Council of the UN is unthinkable pursuant to art. 15-ter StICC, but based on the theory of the interests of justice as we have seen that in practice used by the powers of the Prosecutor.

Obviously, the punishment through internal courts for those

responsible for the crime of aggression remain feasible. Proceedings that are based not only on the criteria of territoriality and nationality but also on the principle of universal jurisdiction. So, we can talk about the punishment of those responsible for these crimes at the internal courts of the territorial state (Ukraine) and of the state of nationality (Russia and Belarus) given that the Russian penal code and the Belarusian one provides for the type of aggression as well as war crimes. And when can this happen? After the end of the war? And what about the undoubted evidence against those responsible? And how will the perpetrators be arrested?

These are questions that are not difficult to be answered but difficult to become feasible in practice. With regard to the principle of universal jurisdiction, no link, both territorial and national, is requested with the commission of the crime and not even the presence of the suspect on the territory of the State who intends to proceed as we have seen in practice in the crimes committed against humanity in Syria by Syrian citizens against Syrian citizens. Certainly, war crimes and crimes against humanity can be prosecuted in many European and non-European States on the basis of the principle of universal jurisdiction with the exclusion of some States such as the Netherlands which extend their criminal jurisdiction to the crime of aggression, in absence of territorial links. But even in this

case, obstacles noted in relation to the crime of aggression remain, such as that of immunity before domestic courts where recognition is presented in a different way than in international courts. Since functional immunities are not applicable before the commission of international crimes, this opinion does not usually include the commission of the crime of aggression, as can also be seen from the work of the UN International Law Commission (ILC).

The role of ICJ

The Ukraine after the Russian invasion on 27 February 2002, based on the prevention and repression of the crime of genocide, presented a proceeding against the Russian Federation before the ICJ, addressing the indication of provisional measures according to art. 41 of the Statute of the Court. Ukraine also relied on art. 74, par. 3 of the Rules of the Court requesting that the President exercise his power:

"(…) in such a way as it will enable any order the Court may make on the request for provisional measures to have its appropriate effects (…) to immediately halt all military actions in Ukraine pending the holding of a hearing (…) (precautionary request, par. 1)".

The Court responded immediately. On 1 March 2022, the relative hearings are scheduled for 7 and 8 March, while the President has reminded the Russian Federation to behave in accordance with art. 74, par. 3 but without any reference to his attack.

Ukraine has asked for an interpretation of the obligation of prevention and repression based on art. I of the Convention and the related acts of genocide as defined by articles II in relation to the punishable conducts, art. III and to par. 26 of the related appeal based on the principle of good faith and on the prohibition of abuse of the right:

"(…) One Contracting Party may not subject another Contracting Party to unlawful action, including armed attack, especially when it is based on a wholly unsubstantiated claim of preventing and punishing genocide (…)" (par. 27).

The justification of Ukraine for the use of these articles of the Convention was based on Putin's speech of 22 February 2022 who spoke of special military operations, so the appeal is intended to avoid and "(...) to protect people who, for eight years now, have been facing humiliation and genocide perpetrated by the Kiev regime (...)".

Ukraine argues that the Convention does not allow the false accusation of having committed genocide. Relevant actions for this crime include armed attacks thus avoiding the exploitation of the notion of genocide and "(…) undermine(s) (the Convention) object and purpose, and diminish[es] [its] solemn nature (...)" (appeal, par. 28).

It is certainly an innovative appeal that should be appreciated by international lawyers. Above all, a strong appreciation is needed regarding the object and purpose of the Convention and the related values it seeks to protect. We must take into account that

Ukraine has assessed that the entire convention on genocide is of a binding nature and that *erga omnes* obligations are created that must protect the entire community. But is this a brilliant appeal? Does it aim to stop the conflict between these two States from a diplomatic point of view and to avoid involving others as well? The doubts and observations are many and above all the speed of this appeal is not so easy to approve the committing of the crime of genocide and of any other international crime that can be included in the relative appeal.

A first doubt of this appeal arises from the Ukrainian attempt to try the ICJ to "verify" the prohibition of the use of armed force. Under which jurisdiction, however, a court can do this? From this point of view, the precautionary requests and the real subject of the dispute have tried to be resolved but without any concrete result given that have not been entered in the precautionary phase of the ICJ jurisdiction.

Let's not forget that the Ukrainian appeal was based on art. IX of the Convention against Genocide and for this reason the ICJ can decide on "(…) disputes between the contracting parties relating to the interpretation, application or fulfillment (…)" of the Convention (Akhavan, 2015).

Therefore, the existence of one's own jurisdiction is needed as we have seen in the Equatorial Guinea v. France case and the

related precautionary order of 7 December 2016[1]. In reality, this clause does not impose any particular preliminary requirements and we continue to say that the problem continues to be the existence of a dispute with various points for discussion and decision and as Ukraine rightly used in its appeal: "(…) a disagreement on a point of view of law, a conflict of legal views or interests (…)" (Mcintyre, 2016)[2].

In a more concrete analysis of the appeal presented, we must take into consideration the points that need to be assessed. We are talking about: "(…) the claim of one party that is positively opposed by the other"[3]. The ICJ has no competence in the exercise of its litigation function as well as in the case of a concrete conflict of interest and to resolve an ongoing dispute[4]. What is the object of the dispute and the verification that this dispute falls within the scope of the relevant Convention used as well as if it contains the jurisdictional basis of the ICJ? What is

1According to par. 31: "The Court may indicate provisional measures only if the provisions relied on by the Applicant appear, *prima facie*, to afford a basis on which its jurisdiction could be founded, but need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case (see, for example, Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014, p. 151, para. 18)".

2Mavrommatis concessions in Palestine, German interests and, in Polish Upper Silesia cases, in PCIJ, Serie A, nn. 2 and 6. PCIJ, Reports, 1924, Series A, par. 11.

3South West Africa cases, preliminary objections of 21 December 1962, p. 328.

4Nuclear tests cases (Australia v. France) of 20 December 1974, par. 59, "(…) Thus the Court finds that no further pronouncement is required in the present case. It does not enter into the adjudicatory functions of the Court to deal with issues *in abstracto*, once it has reached the conclusion that the merits of the case no longer fall to be determined. The object of the claim having clearly disappeared, there is nothing on which to give judgment (…)".

the moment of the beginning of the dispute, i.e. the pre-existing one of the appeal or the moment that the military invasion began? The consumption of criminal conduct certainly has to do with time and place.

These are certainly interesting topics and thoughts of a broad discussion. For the writer, the subject of the dispute as well as the issues relating to the interpretation and execution of the agreement are important. So we have a crime of genocide within days of the Russian invasion? Is the genocide a crime that has been committed for years given the Russian attitude from 2013-2014 in the Ukrainian territory? Is therefore asked to the ICJ to:

"(...) adjudge and declare that: (a) Ukraine has not committed genocide; and that, consequently, (b) Russia has no right under the Convention to carry out actions in and against Ukraine and that both (c) the recognition of the republics of Donetsk and Luhansk and (d) the military operation are based on a false claim of genocide and therefore [have] no basis in the Genocide Convention. Furthermore, (e) appropriate guarantees of non-repetition and (f) the reparation of the damages caused (…)" are requested (...)"

The affirmations used by both the Russian Federation and Ukraine are contrary and this justifies the basis of a dispute and therefore that the dispute must concern the Convention and the related norm of a customary nature. The invocation by both sides for the crime of genocide and the related responsibility underline the weakness of the Russian federation to speak of concrete facts but only of general declarations which, in our opinion, do not allow the basis for the adoption of specific measures requested.

According to the judgment of plausibility which is a necessary element for the related precautionary measures, the ICJ has already ruled in the Belgium v. Senegal case of 20 July 2012 where he stated:

"(…) the power of the Court to indicate provisional measures should be exercised only if the Court is satisfied that the rights asserted are at least plausible (...)"[5].

The ICJ obtained an abstract element of plausibility and at the same time sufficient for the rights invoked for the interpretation of the relevant rules. We must say that we can review this path also in the case of Ukraine. The attempt is to frame the issue of the use of armed force in the context of the Convention and its forced interpretation which is implausible given the specific meaning that must be included in the precautionary phase. According to the Ukraine, the prevention of the obligation of genocide:

"(…) is necessary implication (…) that it must be performed in good faith and not abused (…)"[6]. According to the Ukrainian appeal, an accusation

5ICJ, Belgium v. Senegal of 20 July 2012, "(…) the Court must begin by ascertaining whether there was, "at the very least[,] a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute" (Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, ICJ, Reports 2011 (I), p. 132, para. 157). According to the Court's jurisprudence, "the precondition of negotiation is met only when there has been a failure of negotiations, or when negotiations have become futile or deadlocked" (ibid., p. 133, para. 159). The requirement that the dispute "cannot be settled through negotiation" could not be understood as referring to a theoretical impossibility of reaching a settlement. It rather implies that, as the Court noted with regard to a similarly worded provision, "no reasonable probability exists that further negotiations would lead to a settlement" (South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, ICJ, Reports 1962, p. 345)

6Par. 14 of the presented instance.

against another State for acts of genocide that implies the obligation of prevention and repression must be based and proposed as an interpretation of art. I of the Convention and according to art. 31, paragraph, lett. c) of the Convention of Vienna on the law of treaties, interpreting: any relevant rules of international law applicable in the relation between the parties (…)" (Peat, 2019; Chang.Tung, 2019; Hollis, 2020; Fitzmaurice, Merkouris, 2020).

Ukraine also refers to art. VIII of the Convention on Genocide which provides that any State Party may require the bodies of the United Nations to take appropriate measures to prevent acts of genocide. Fairly intelligent position based on the thought that the Russian Federation reacted to the alleged genocide and in the context of legitimate tools available such as the Charter of the UN ban on the use of armed force. Obviously there is also another very important element that the acceptance of the Ukrainian application also includes the admission of humanitarian intervention or similar theories provided for by international humanitarian law.

Already in the recent case Gambia v. Myanmar of 23 January 2020[7], the ICJ proceeded with an element of plausibility of the concrete case based on the facts underlying the request. So this can be a negative and blocking element for the Ukrainian arguments since the ICJ was thought to be based on the probability of at least some and not of all the facts that deal with the precautionary case referred to in Gambia. Items eligible to be applicable by the Convention. On the other hand, Ukraine has an ace up its sleeve since it asks for the verification of a negative

7ICJ, Gambia v. Myanmar, Request for the indication of provisional measures, order of 23 January 2020.

fact, given that it has not committed genocide and that its request is based on the point of view of the burden of proof and that it finds bases on the Republic of Guinea v. Democratic Republic of the Congo case of 30 November 2010[8] and that it is up to the Russian Federation to provide the relevant evidence that the genocide was committed in Ukrainian territory.

However, Ukraine has not taken a clear position on the link between the precautionary measures requested and the related right for which it seeks protection. Ukraine asked the ICJ:

"(a) to immediately suspend military operations, which began on 24 February, which have as their stated purpose the prevention and repression of the alleged genocide; as well as (b) to immediately ensure that no further military operations (having the same purpose) are carried out by armed, military or irregular units, which are directed or supported by Russia, as well as by any other organization or person; (c) guarantees that the dispute will not worsen, and to order Russia to (d) file reports on the implementation of the measures, as required by the new article of the internal judicial practice of the court (…) there is no rule that (…) would make it necessary to address both of them at the same time (…)".

In particular, judge Xue held that:

"(…) one may wonder how those provisional measures can be meaningfully and effectively implemented by only one Party to the conflict (...)", stressing that the issue requires complex negotiations[9].

8ICJ, Republic of Guinea v. Democratic Republic of the Congo: "(...)it is alleged that a person has not been afforded, by a public authority, certain procedural guarantees to which he was entitled, it cannot as a general rule be demanded of the applicant that it prove the negative fact which it is asserting. A public authority is generally able to demonstrate that it has followed the appropriate procedures and applied the guarantees required by law-if such was the case-by producing documentary evidence of the actions that were carried out. However, it cannot be inferred in every case where the Respondent is unable to prove the performance of a procedural obligation that it has disregarded it: that depends to a large extent on the precise nature of the obligation in question; some obligations normally imply that written documents are drawn up, while others do not. The time which has elapsed since the events must also be taken into account (…)".

9According to par. 6: "(...) The present situation in Ukraine demands all efforts

The ICJ does not have the power to negotiate or resolve disputes but has shown the swift international responsibility to take a stand in the face of an international crisis. The ICJ within that spirit has affirmed that:

"(…) the Court is profoundly concerned about the use of force by the Russian Federation in Ukraine, which raises very serious issues of international law (…) is mindful of the purposes and principles of the United Nations Charter and of its responsibilities in the maintenance of international peace and security as well as in the peaceful settlement of disputes under the Charter and the Statute of the Court. It deems it necessary to emphasize that all States must act in conformity with their obligations under the United Nations Charter and under other rules of international law, including international humanitarian law (…)"[10].

According to our opinion, the line obtained by the ICJ was suitable to reach the final objective which was what is needed for any controversy of an international nature, namely the restoration of international peace and security. The ICJ obtained a swift position based on the necessity of the moment given the inapplicability of the Security Council to take a position on the matter. Obviously the danger was great due to the danger of losing international credibility as can also be seen from the Declaration in Judge Bennouna who stated on the matter:

"(…) I voted in favour of the Order (…) because I felt compelled by this tragic situations, in which terrible suffering is being inflicted on the Ukrainian people, to join the call by the World Court to bring an end to the

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that will contribute to a peaceful resolution of the dispute between Ukraine and the Russian Federation. The present Order, to my regret, prejudges the merits of the case (see paragraphs 56-59 of the Order). Moreover, in the context of an armed conflict, one may wonder how those provisional measures can be meaningfully and effectively implemented by only one Party to the conflict. When the situation on the ground requires urgent and serious negotiations of the Parties to the conflict for a speedy settlement, the impact of this Order remains to be seen (…)".

10ICJ, par. 18 of the Order of 22 March 2022.

war (...)" (par. 1).

And he pointed out that the ICJ: It is not sufficient for the Court to state that:

"Ukraine has a plausible right not to be subjected to military operations by the Russian Federation for the purpose of preventing and punishing an alleged genocide in the territory of Ukraine" (Order, paragraph 60). The Court must also be able to found this alleged plausible right on one of the provisions of the Genocide Convention which the Russian Federation is said to have breached. The Court clearly failed in this task; it did not identify the rights of Ukraine under the Convention which must be preserved by provisional measures pending the judgment on the merits (Statute of the Court, article 41) (…)".

The ICJ got a contextual and systematic interpretation. The latter was proposed by the Chapter of the UN and includes the spirit and history of the ICJ as well as what was requested by Ukraine as it stated that:

"(…) the Contracting Parties must implement this obligation [of preventing and punishing genocide] in good faith, taking into account other parts of the Convention, in particular Articles VIII and IX, as well as its Preamble (…)"[11].

States must fulfill their obligations to prevent and suppress genocide using the instruments of the same Convention. In the case of use of other instruments, they must remain within the spirit and obligations established by the notions of international law and above all: "(…) must be in conformity with the spirit and aims of the United Nations, as set out in article 1 of the UN Charter", that it mentions the maintenance of peace and security, the renunciation of acts of aggression or other violations of the peace, and the peaceful resolution of disputes[12]. According to a

11ICJ, par. 56 of the Order of 22 March 2022.
12ICJ, par. 58 of the Order of 22 March 2022.

teleological interpretation the ICJ affirmed that:

"(…) it is doubtful that the Convention, in light of its object and purpose, authorizes a Contracting Party's unilateral use of force in the territory of another State for the purpose of preventing or punishing an alleged genocide (…)"[13] and "(…) not to be subjected to military operations by the Russian Federation for the purpose of preventing and punishing an alleged genocide in the territory of Ukraine (...)"[14].

For the ICJ at the moment the Russian Federation did not commit the crime of genocide[15].

Within the spirit of the decision we can recall the line that was also followed by the ICJ itself, given that the requirements are plausible and that the ICJ has already decided in the past in similar cases as in the Mexico v. United States case of 16 July 2008:

"(…) a link (…) between the alleged rights the protection of which is the subject of the provisional measures being sought, and the subject of the principal request submitted to the Court (...)"[16].

In Bosnia Herzegovina v. Serbia and Montenegro[17] case we have seen the plausibility based on *prima facie* jurisdiction according

13ICJ, par. 59 of the Order of 22 March 2022.

14ICJ, par. 60 of the Order of 22 March 2022.

15ICJ, par. 59 of the Order of 22 March 2022.

16ICJ, Mexico v. United States of 16 July 2008, par. 58, "(…) a request for the indication of provisional measures, "must be concerned to preserve (…) the rights which may subsequently be adjudged by the Court to belong either to the Applicant or to the Respondent" (Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Provisional Measures, Order of 15 March 1996, ICJ Reports 1996 (I), p. 22, para. 35)"; whereas a link must therefore be established between the alleged rights the protection of which is the subject of the provisional measures being sought, and the subject of the principal request submitted to the Court.

17ICJ, Bosnia Herzegovina v. Serbia and Montenegro of 13 December 1993, par. 36: "(…) the Court, having established the existence of one basis on which its jurisdiction must be founded, namely on article IX of the Genocide Convention, and having been unable to find that other suggested bases could *prima facie* be accepted as such, ought not to indicate measures for the protection of any disputed rights other than those which might ultimately form the basis of a judgment in the exercise of the jurisdiction thus *prima facie* established (…)".

to the precautionary order where the ICJ:

"(…) ought not to indicate measures for the protection of any disputed right other than those which might ultimately form the basis of a judgment in the exercise of its jurisdiction (…)"[18].

More recently in Armenia v. Azerbaijan case of 7 December 2021[19], the ICJ affirms that: "(…) a link must exist between the rights whose protection is sought and the provisional measures being requested (...)"[20].

In any case, it can be seen that the ICJ has obtained a different line of thinking, based on art. 75, par. 2 of the Rule of Court and on the measures that are part of the Rules or those required. The ICJ should also decide on armed aggression on the basis of baseless accusations of genocide. But even if a crime of genocide has not been committed, the *periculum in mora*[21] remains, consisting of the irreparable risk and the relative rights required for precautionary protection and the relative urgency as we have also seen in the Qatar v. United Arab Emirates case of

18ICJ, Bosnia Herzegovina v. Serbia and Montenegro of 13 December 1993, op. cit., par. 37.

19ICJ, Armenia v. Azerbaijan of 7 December 2021, par. 45: "(…) the Court is not called upon to determine definitively whether the rights which Armenia wishes to see protected exist; it need only decide whether the rights claimed by Armenia on the merits, and for which it is seeking protection, are plausible. Moreover, a link must exist between the rights whose protection is sought and the provisional measures being requested (…)".

20ICJ, Armenia v. Azerbaijan of 7 December 2021, par. 46.

21ICJ, Allegations of genocide under the Convention on the prevention and punishment of the crime of genocide (Ukraine v. Russian Federation) of 16 March 2022, the ICJ declared that: "(…) the civilian population affected by the present conflict is extremely vulnerable. The "special military operation" being conducted by the Russian Federation has resulted in numerous civilian deaths and injuries. It has also caused significant material damage, including the destruction of buildings and infrastructure. Attacks are ongoing and are creating increasingly difficult living conditions for the civilian population (...)" (par. 75).

23 July 2018[22]. We reported the last case since Ukraine in its instance stated that:

"(...) Ukraine requests provisional measures to protect its people from the irreparable harm caused by Russia's military measures that have been launched on a pretext of genocide (…) significant and irreparable loss of life and property and a humanitarian crisis (…) Ukrainian people are vulnerable and in need of the Court's protection, and the urgency of the situation is apparent (...)"[23].

In our opinion, Ukraine asks for a link between state law, the right to the protection of human life and the physical integrity of beneficiaries who find themselves in a situation of vulnerability. A position based on the requirement of the link between the rights and obligations of states to protect human rights, individual rights and the punishment of international crimes if they are verified (Liakopoulos, 2020)[24]. ICJ asked Russia:

22ICJ, Qatar v. United Arab Emirates of 23 July 2018, par. 61: "(…) the power of the Court to indicate provisional measures will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights in dispute before the Court gives its final decision (Jadhav (India v. Pakistan), Provisional Measures, Order of 18 May 2017, IJC, Reports 2017, p. 243, para. 50; Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Provisional Measures, Order of 19 April 2017, ICJ, Reports 2017, p. 136, para. 89). The condition of urgency is met when the acts susceptible of causing irreparable prejudice can "occur at any moment" before the Court rules on the merits (Immunities and Criminal Proceedings (Equatorial Guinea v. France), Provisional Measures, Order of 7 December 2016, ICJ, Reports 2016 (II), p. 1169, para. 90). The Court must therefore consider whether such a risk exists at this stage of the proceedings (…)".

23Par. 19 of ukrainian istance.

24See in case: Ukraine v. Russia, the dissenting opinion of judge Bhandari, par. 42: "(…) From the point of view of irreparable prejudice, the present case resembles LaGrand. In that case, Germany invoked article 36, paragraph 1 (b), of the VCCR as the rights it sought to protect on the merits. That provision confers on individuals the right, to be informed "without delay of [the] rights under this subparagraph", namely that the consular post of the State of nationality of foreign individuals be informed of their detention. The Court found that Walter LaGrand's "execution would cause irreparable harm to the rights claimed by Germany in this particular case". Although it

"(…) to refrain from military attacks against civilians and civilian objects, including residential premises, emergency vehicles and other specially protected objects such as schools and hospitals, and to ensure immediately the safety of the medical establishments, personnel and emergency vehicles within the territory under attack or siege by Russian troops (…)".

He also asked the Russian Federation for related information for compliance with the measures adopted and the scope of the monitoring procedure provided for in par. 2 of art. 39. The conflict still continues and the ICJ has shown its sensitivity to intervene quickly to obtain a precautionary ruling. The next few months will see the results obtained as well as answer the question whether the punishment of a crime such as that of genocide has found a suitable court or other ways are needed not to resolve the ongoing dispute but the punishment of the protagonists of this dispute.

Versus a hybrid court

We are talking about a hybrid court created within the Ukrainian judicial system with the possible support of the Council of Europe. A hybrid court of a regional nature like the one that was created in Senegal in the past to try the former Chadian dictator

did not say so explicitly, the Court found that there was irreparable prejudice since, as Germany had argued, it would not have been possible to restore the status quo ante after Walter LaGrand's death. First, the present case also concerns the loss of human life, which, similarly to LaGrand, makes it is impossible to restore the status quo ante. Second, similarly to LaGrand, in the present case a State argued that a right it plausibly holds under international law could be irreparably prejudiced by acts aimed at depriving individuals of their life. Third, similarly to LaGrand, the Court is asked to protect the rights of a State, not the rights of an individual, and the loss of human life would be the cause of irreparable prejudice to the State's right. Consistency in the Court's jurisprudence would require in this instance a decision similar to the one in LaGrand.

Hissène Habré, which was indeed a successful example, although it took Biblical times to finally arrive at the conviction of the accused in 2016. Not viable in our case, given that Russia has left the Council of Europe.

There remains, only the path of investigation and the possibility of punishment by the ICC, as a concrete and promising tool currently available to ascertain responsibility for crimes committed in relation to the invasion of Ukraine by Russia. It is an independent court not based on a possible "political paralysis" of the UN but established ex ante by means of a treaty and on art. 27 StICC.

Russia with the path it has followed remains outside the world legal order, leaving open to international society the hypothesis of an international arrest of the top Russian military and political leaders for war crimes or crimes against humanity, certainly with difficulties of execution after this way of possible punishment. Diplomacy up to now does not show that we have arrived at some concrete elements of a sigh of ending the fire and continuous aggression, but also the reduction of international criminal responsibilities. Indispensable phases that guide us to the Nuremberg process and the relative individual and state mechanisms of responsibility applied promptly in the face of violations of international law of such gravity and destructiveness in which the strength and compactness of the

response on the international level to the aggression of Russia is so total and it certainly makes us reflect once again on the lack of as much strength and compactness as a source of other situations of violations of international law and human rights which can in many ways be said to be equally serious.

Refugees are daily reality where international solidarity with the victims of crimes has been mystified to the point of being viewed with suspicion. A few months ago, not to mention the last few years, the Belarusian situation and what happens with the Polish borders, the endless deaths despite the fact that in that case we have no crime of aggression but another type of war of a modern type based on business and on increasingly advantageous economic agreements from countries that have a long history of contempt for fundamental rights and the general principles of international law.

Are human rights protected?

Equal attention to the history of recent years due to the lack of respect for human rights in situations such as those in Afghanistan, Iraq, Palestine, Yemen, Myanmar, Syria and other conflict situations in relation to those enormous responsibilities seen massive and continuous violations of international law and without any concrete reaction behavior of the international community to the violations committed.

Perhaps the debate on the lack of complete protection of violated human rights remains open for another time, as well as the lack of consistency in the principles of international law in situations of extreme gravity despite the fact that the attack was defined by the Russian President himself as a "special military operation", based on art. 51 of the United Nations Charter and implementation of the Treaty of friendship and mutual assistance signed with the self-proclaimed republics of Lugansk and Donetsk on 22 February:

"(...) in accordance with article 51 (Chapter VII) of the UN Charter, with permission of Russia's Federation Council, and in execution of the treaties of friendship and mutual assistance with the Donetsk People's Republic and the Lugansk People's Republic, ratified by the Federal Assembly on 22 February (...)".

Which treaty was signed and by whom? We have serious doubts about the lawfulness on an international level in relation not only to the signing of these treaties as well as the relative Russian federal law approved by the Duma:

"(...) The Treaty reaffirms the policy of the Russian Federation to develop comprehensive, forward-looking cooperation with the Donetsk People's Republic (…) provides for broad cooperation in the political, economic, social, military and humanitarian areas (...)".

Russian justifications relating to its intervention and above all covered by rules of international law and on the justification of individual and collective self-defense and based according to Putin on the threatening presence of NATO in Ukraine:

"(…) with NATO's eastward expansion the situation for Russia has been becoming worse and more dangerous by the year (…) NATO leadership has been blunt in its statements that they need to accelerate and step up efforts to bring the alliance's infrastructure closer to Russia's borders (…) they have

been toughening their position (…) stay idle and passively observe these developments (…) an absolutely irresponsible thing to do for us (…)".

So let's talk about preventive self-defense as we have already seen in the past on the intervention in Iraq back in 2003:

"(…) to be replaced by "the law of the fist" whereby the strong is always right and has the right to do anything and in choosing methods to achieve his goals is not constrained by anything, then one of the basic principles of international law will be put into question, and that is the principle of immutable sovereignty of a State (…)" (Nguyen Roualt, 2003).

Historical justification as we have seen to the Russian intervention against Georgia in August 2008 to stop the alleged genocide of South Ossetians and within this spirit also the recognition of a right to external self-determination in the hands of the republics of Donetsk and Lugansk and to the claim that Russia has the right to intervene to ensure that Ukraine respects this right towards the peoples of the two Republics:

"(…) this does not contradict the high values of human rights and freedoms in the reality that emerged over the post-war decades (…) nations cannot enjoy the right to self-determination, which is enshrined in article 1 of the UN Charter (…) the people living in territories which are part of today's Ukraine were not asked how they want to build their lives when the USSR was created or after World War II (...)".

For yet another time, international law remains the absolute protagonist in a stage where the arguments and discussions are many: Distinct humanitarian interference in assistance operations and protection operations; the different considerations that the types of transactions in question deserve, due to the principles on which they interfere; considerations relating to the existence of a right to humanitarian assistance, whether relative or absolute, and/or a duty of states to

assistance; the identification of the rules of international humanitarian law, applicable to protection operations.

It would be necessary to analyze the possibility of finding a right or a duty to intervene in the legal field. We cannot speak of the right of humanitarian intervention in protection because armed action would affect not only the limit of domestic jurisdiction, but also the prohibition of the use of force or its threat. The "relativization of domestic jurisdiction" would be commonly accepted by the international community in the current state of international law. In this sense we can recall some decisions of the ICJ, that the limits of domestic jurisdiction would be designated by the existence of general principles of international law and by the consequent obligations towards the community. The limitation of the use of force is not only a conventional provision, but a principle of international law. The limit would therefore constitute an essential cornerstone of the entire structure of the international community from which not even the unanimous agreement of the States could remove its effectiveness without therefore founding a new international order.

Verification and control of the effective application of coercive measures and related sanction regimes have been recognized as an ordinary aspect of peace operations. The verification was required, together with the control, to determine the

effectiveness of the arms embargo and other measures taken under article 41 of the Charter of the UN. The short of war coercive measures have not been applied or that the affected State has resorted to tricks to escape the limitations that have been imposed on it, continuing its commercial and financial trafficking, without being affected in the least by the decisions taken within the UN. The activity of monitoring the effective application of sanctions is made difficult by the reluctance of governments, for reasons of sovereignty or economic interest, to accept international controls or inspections on alleged or ascertained violations produced by them or their citizens.

Concluding remarks

Finally, on the one hand, I have serious doubts that after the entry into force of the UN Charter, a customary norm on humanitarian interference (unilateral) has been formed, above all because of the ambiguity of the aims pursued by the States in some interventions and as these have generally justified their action with different reasons (for example by invoking self-defense). On the other hand, however, the absence of a formal condemnation of various types of interventions by the international community indicates that in some cases there is a tendency to condemn this practice because it is morally justifiable. However, this is not sufficient to conclude that

(unilateral) humanitarian interference is now part of customary international law; moreover, recent experiences show a predominant trend for the collective form, States turn to the UN to seek a response to humanitarian emergency situations that arise on a case-by-case basis. So, rather than talking about the lawfulness or otherwise of unilateral humanitarian interference, it is perhaps more realistic to talk about interference "authorized" by the Security Council, but not in the Russian case!

Consequently, we can believe that the awareness of the defense of human rights by the international community must be matched by a political-juridical study on the criteria of opportunity and execution of humanitarian interference. Never before has there been a need for regulation of this activity which is called: "humanitarian interference" or otherwise; it is imposed above all because of the important principles it involves such as the defense of human rights, the use of force in international relations, the principle of sovereignty and equality between States. But this regulation will have to concern not only the activity of the States but also that of the Council, which is composed precisely of States, in order to avoid that the body is transformed into a mere instrument of legitimation of state interventions and above all in order to guarantee compliance with the UN Charter.

In Europe and in international community some policies such as immigration, humanitarian assist, respect for human rights, etc. is under attack and in deep crisis, but Europe too remains in keeping with the founding fathers and the words of Jean Monnet. The tensions that in some countries concern the respect of human rights and the principles of international law can be the starting point for consolidating the value of the principles of international and European Union law, qualifying it as one of the traits that characterize the constitutional identity of the European Union. Union law, as a law codified in writing is valid and often needs to be reformed to better meet the requirements arising from the international law. In fact, in many countries it bears the imprint of the former "undemocratic" power and the respect of international and European Union rules often remains contradictory and not very transparent and certainly does not meet the specific needs of each individual member country. The centralization of a unitary system that seeks the Union unfortunately does not reflect the decentralized structures of daily life, i.e. national law and often does not even correspond to the needs of peoples, which vary from one region to another despite the fact that all are part of the same Euro-unit organization. And the question is: In such situations, would it really be surprising if the EU institutions or other Member States used all the legal means and remedies made available by

the Treaties? And the international law is it in a deep crisis and that it must better organize some rules to be respectful of certain countries and avoid other crises of all kinds?

References

Akhavan, P. (2015). Balkanizing jurisdiction: Reflections on article IX of the Genocide Convention in Croatia v. Serbia. *Leiden Journal of International Law, 28,* 896ss.

Chang-Tung, L., Garcia, T. (2019). *La Convention de Vienne sur le droit des traitès. Bilan et perspectives 50 ans après son adoption.* Pedone, Paris.

Fitzmaurice, M., Merkouris, P. (2020). *Treaties in motion. The evolution of treaties from formation to termination.* Cambridge University Press, Cambridge, 282ss.

Hollis, D.B. (2020). *The Oxford guide to treaties.* Oxford University Press, Oxford.

Liakopoulos, D. (2020). *The role of not party in the trial before the International Court of Justice.* Maklu, Antwerp, Portland.

Mcintyre, J. (2016). The declaratory judgment in recent jurisprudence of the International Court of Justice. Conflicting approaches to state responsibility. *Leiden Journal of International Law, 29 (1),* 180ss.

Nguyen Roualt, F. (2003). L'intervention armèe en Irak et son occupation eu regard du droit international. *Revue Gènèrale de Droit International Public, 49,* 836ss.

Peat, I. (2019). *Comparative reasoning in international courts and tribunals.* Cambridge University Press, Cambridge.